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No. 82-1673

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MARVIN BRODIE, M.D., et al.,

Petitioners,

v.

BOARD OF MEDICAL EXAMINERS FOR THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Little of what the Board has submitted in opposition to the petition for a writ of certiorari relates to whether the issues are of sufficient importance to warrant this Court's attention. The Board's position apparently is that the decision below should not be reviewed because the court below correctly resolved the issues. This reply is necessary in order to clarify some salient issues which the Board has mischaracterized.

The crucial aspect of this case is the procedural posture of the litigation. The Board's long recitation of facts, Res. Br., at 3-5, 11-12, which were never presented before the district court, obscures the fact that review of the regulation

has thus far proceeded in a vacuum. The court of appeals has validated, without discovery or hearing, a regulation which has no regulatory history, no statement of purpose, and no findings, even though the challenging party is prepared to show that the regulation has no basis in reason and cannot further any legitimate state purpose. Thus, the Board's litany of facts is merely a distraction: such facts were not part of the record before the district court and have never been susceptible to discovery or rebuttal at any time in the history of litigation concerning this regulation.

Furthermore, the Board's emphasis on its success in state court proceedings is misleading and irrelevant. Res. Br., at 1, 2, 4-5, 8, and 9. The issues before the state courts concerned the validity of the regulation under state law. The federal constitutional claims were litigated in the federal courts. The Board's repetitious observation that petitioners lost in the courts below is quite unnecessary. After all, the petitioners are the party seeking review.

ARGUMENT

1. The Board misanalyzes the reasons for granting a writ of certiorari with respect to the due process issue. The question is not whether the rational relationship test is a liberal one. That point is not disputed. *See, e.g., Minnesota* v. *Cloverleaf Creamery*, 101 S.Ct. 715 (1981). The issue is whether the court of appeals has taken the liberal rational relationship test to such an extreme that the due process clause has been emptied of meaning. The petitioners are prepared to show that the regulation bears no relationship to the suggested state purpose, cannot improve the safety of chiropractic patients, and may increase the risk for such patients. As the Board tacitly recognizes, Res. Br., at 6, the only basis of record for the decision below is the district court's hypothesis, wholly unsupported by the record before it, that radiological services provided involuntarily to chiropractors will benefit chiropractic patients. Pet. Br. App., at B-8. The Board does not dispute that such a perfunctory resolution of an important constitutional right raises significant issues requiring review by this Court; the Board attempts to avoid the need for review by pointing to extra-record evidence to salvage the decision below. Res. Br., at 3-5, 11-12.

2. The characterization of the regulation as an "anti-discrimination" provision, Res. Br., at 11, is constitutionally irrelevant. The regulation compels radiologists to provide services to chiropractors and thereby infringes on the radiologists' due process right to practice their profession. The constitutional question is whether the regulation bears a rational relation to a legitimate state end, not whether the regulation is framed in a particular form. Examining the form of the regulation does not illuminate the rationality of the connection between regulatory means and ends.

See, e.g., Minnesota v. *Cloverleaf Creamery*, 101 S.Ct. 715 (1981); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

3. The Board's failure to recognize the proper approach to a due process claim starkly demonstrates the need for guidance from this Court. The Board repeats the error below in reciting the traditional rigid categorical test for equal protection claims and applying the test to this due process case. Res. Br., at 12-13.* The proper approach under the due process clause, however, is to determine whether the state interest is more significant than the burden on the individual right. The lower court's failure to apply this flexible approach to a due process claim results in a loss of conceptual clarity and a failure to recognize that the protection of individual liberty may be more complicated than the protection of the general right not to be classified according to certain characteristics. Thus, this Court should provide review in order to clarify fundamental constitutional issues regarding the due process clause.

4. The Board fails to isolate the true constitutional issue this case raises under the First Amendment. The court

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* The Board indicates that the analysis under the equal protection and due process clauses are analytically identical and quotes language from *Beller* v. *Middendorf*, 632 F.2d 788, 808 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 3030 (1981). The language from *Beller*, however, refers to analytical and rhetorical similarities in the approaches that the Ninth Circuit has discerned. *Beller* does not support the proposition that a due process challenge may be resolved by application of an equal protection test. The court recognized that unlike the categorical approach of equal protection analysis, "substantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly involved, the importance of the government interests furthered, the degree of infringement and the sensitivity of the government entity responsible . . . to more carefully tailored alternative means of achieving its goals." *Id.* at 807.

below rejected the petitioners' claim under the First Amendment because it believed alternative means of communication exist. The court noted and the Board urges at length that conduct must be communicative in order to be protected. Res. Br., at 15-18. The only evidence of record, however, is that petitioners' conduct constituted symbolic speech, intended and understood to be communication. Pet. Br. App., at A-7 n.10. As a result, the court below concluded by resting its decision on the ground that alternative means of communication exist. The Board's extended discussion of whether conduct constitutes speech is not relevant to the fundamental constitutional issue raised by the lower court's decision.

5. The Board's infringement on petitioners' right to free expression cannot be justified on the Board's broad assertion that regulation of the public health is part of the police power of the state. The court of appeals committed a significant constitutional error in ruling that petitioners' expressive conduct is not protected by the First Amendment because alternative channels of communication exist. Pet. Br. App., at A-9. The Board cannot insulate that error from review by this Court with the incantation that the regulation is within the police power, because even so, the restriction must be no greater than is essential to further the governmental interest. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Thus, this Court should review this case to provide guidance and to resolve fundamental constitutional issues raised by the decision below.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

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